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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-1530

MAURICE GOLDBERG, CLAIRE GOLDBERG, MAURICE GOLDBERG, as Custodian for MARION GOLDBERG, BETTE GOLDBERG and JOYCE E. GOLDBERG, under The New York Uniform Gifts to Minors Act, and MAURICE GOLDBERG, HENRY J. GOLDBERG and SAMUEL M. SPRAFKIN, as Trustees under the Trusts for the benefit of MARION GOLDBERG, BETTE GOLDBERG and JOYCE E. GOLDBERG,

Petitioners,

—against—

ARROW ELECTRONICS, INC., and STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,

—against—

ARROW ELECTRONICS, INC., and STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on March 25, 1975.

Opinions Below

The opinion of the Court of Appeals (not yet reported) is reprinted as Appendix "A". The memorandum of decision and order of the District Court, which are not reported, are set out as Appendix "B".

Jurisdiction

The judgment of the Court of Appeals was entered on March 25, 1975. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

New York Business Corporation Law compels a shareholder, who does not assent to a corporate merger, to make a choice. He either submits to the merger or accepts the right to receive the fair value of his shares. This right is subject to his compliance with procedures set out in Section 623. His share certificates are endorsed with the statutory legend. He ceases to have shareholder status. He cannot vote his stock. His shares cannot be traded on the stock exchange. He cannot withdraw his dissent without the corporation's consent. He is a monetary claimant for the value of his shares. If the corporation does not commence the judicial proceeding to determine such value, the dissenter must do so. Otherwise he loses his rights. The dissenter fully complies with the provisions of the statute and commences the judicial proceeding. The corporation thereafter unilaterally abandons the merger. The statute reinstates the dissenter to shareholder status. However, it does not restore him to the financial position in which he was when he ceased having shareholder status. His shares, in the meantime, have declined in value and price. The statute terminates the judicial proceeding which he had been compelled to commence. The statute denies him a forum in which to be heard and it forecloses him from claiming damages, losses and expenses.

1. Is Section 623 of the Business Corporation Law repugnant to the due process and equal protection clauses of the Fourteenth Amendment insofar as it is applicable to the abandonment of a merger by a corporation?

2. Is "state action" present within the meaning of the Fourteenth Amendment?

Statutory Provisions Involved

Section 910 of the New York Business Corporation Law (BCL §910) grants to a shareholder, who does not assent to a corporate merger, the right to receive payment of the fair value of his shares, provided he complies with the procedure set out in Section 623.

Section 623 of the New York Business Corporation Law (BCL §623) is entitled "Procedure to Enforce Shareholder's Right to Receive Payment of Shares."

The former is found in McKinney's Consolidated Laws of New York, Book 6, Part 2 and the latter in Part 1 of Book 6. The pertinent portion of the text of BCL §910 is set forth in Appendix "C" at page 25. The text of BCL §623 is set forth at pages 26-33.

Nature of the Action*

Petitioners commenced this action in the United States District Court for the Eastern District of New York. They seek a declaratory judgment that BCL §623 is unconstitutional insofar as it is applicable to an abandon-

* Numerals and letter "a" in parentheses refer to the page in the Appendix of the Record before the Second Circuit Court of Appeals, certified to this Court.

ment of a corporate merger. They claim that they were deprived of their property, rights and remedies, in violation of the Fourteenth Amendment.

Parties:

Petitioners are shareholders, holding less than five percent of the shares in Respondent, Arrow Electronics, Inc., a New York corporation whose shares are listed for trading on the American Stock Exchange (2a-5a, 86a, 121a).

The State of New York was named as a defendant because the action questions the constitutionality of a provision of a State statute. The New York Attorney General appeared on behalf of the State but did not interpose any defense. The State took no position on the issues in the case.

Facts:

Respondent's existence as a New York corporation and Petitioners' shareholdings in Respondent predate the enactment in 1950 of the questioned statutory provision which now is a part of BCL §623(e) (68a, 73a).

Respondent corporation desired to merge into a Delaware corporation which was a shell with no assets. The stated purpose was to remove from New York to Delaware where the laws were more favorable to corporate expansion through mergers (73a-74a, 76a, 86a-87a, 96a).

The common law viewed the corporate charter as a contract between the corporation and all its shareholders, which could not be impaired without the consent of all parties to the contract. In order to grant the corporation the power to pursue changes which the majority desires,

it was necessary to compel objecting shareholders to submit, although the nature of their contract would be altered against their will. Under the statutes which were enacted, if a shareholder did not submit, provision was made for him to be compensated for the value of his shares.

In New York a shareholder, who does not assent to a plan of merger of his corporation into another corporation, acquires the right to be paid the fair value of his shares under BCL §910. This substantive right is subject to compliance by the shareholder with the procedural requirements set out in BCL §623.

In accordance with BCL §623(a) petitioners noted their objections to the proposed merger prior to the meeting. The purpose of such notice is to inform the corporation of the number of its shareholders who are objecting and of the amount of money it would require to pay for such dissenters' shares (Assn. of the Bar: 1934 State Legislation Bulletin). The amount to be paid is the value of the shares as of the day immediately preceding the day on which the merger is authorized by the shareholders [BCL §623(h)(4)].

When the shareholders' authorization meeting was held, Respondent corporation knew the number of objecting shares. It knew the trading prices of the previous day. It knew it required no less than $750,000. However, it had no money to pay for the shares of dissenting shareholders. Furthermore, its existing loan agreements with its institutional lenders did not permit it to pay for such shares. Nevertheless, the merger was authorized by the shareholders other than Petitioners (6a, 47a, 89a, 122a).

Petitioners filed their dissent and delivered their certificates which were endorsed with the statutory legend (6a-8a). Thus they no longer had any rights as shareholders. They ceased having shareholder status. They could not vote their shares. Their shares could not be sold or traded. A transferee would stand in the shoes of his transferor-dissenting shareholder. The dissent may not be withdrawn without the consent of the corporation subsequent to the 90th day after the shareholders authorization meeting.

Instead, Petitioners became monetary claimants for the value of their shares as of the day immediately preceding the shareholder meeting at which the merger was authorized. BCL §623(h)(1) required Respondent to commence the judicial proceeding to determine the rights of dissenters and the value of their shares. When Respondent failed to commence the proceeding, Petitioners did. Had they not commenced the proceeding they would have lost their rights [BCL §623(h)(2)]. When Petitioners sought to move forward with the proceeding, Respondent corporation succeeded in delaying it on the claim that it was negotiating for a loan to pay for Petitioners-dissenters' shares (88a-90a).

More than eight months after the shareholders had approved the merger and when the share value and price on the stock exchange had declined appreciably, Respondent abandoned the merger (101a, 105a, 136a). By virtue of BCL §623(e), Petitioners were reinstated to shareholder status, but they were not restored to the financial position in which they had been. They then made application to the State court for damages, counsel fees, ex-

penses and disbursements. However, the Appellate Division of the State Supreme Court in a memorandum opinion reported in 42 A.D.2d 890, 347 N.Y.S.2d 597 (see Appendix "F" at pages 37-38) construed the statute as a scheme for the regulation of corporate mergers whose comprehensive provisions precluded any relief to Petitioners. The unilateral abandonment of the merger terminated the proceeding which the statute had compelled the Petitioners to commence. The statute reinstated them to shareholder status but did not restore them to the financial position in which they were eight months earlier. It denied them a forum in which to make claim for relief and an opportunity to be heard.

Proceedings in the Courts Below

The District Court:

Petitioners then brought this action in the United States District Court for the Eastern District of New York. The State legislation of which they complain is the provision in BCL §623(e) which enables a corporation unilaterally to abandon its corporate merger, terminating the statutory judicial proceeding, reinstating dissenters to shareholder status, but depriving them of their claims for damages and losses sustained during the period when they are monetary claimants and denying them a forum in which to be heard with respect thereto.

The District Court granted Respondent corporation's motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. It found that there was no "State action," because the position of shareholders, objecting to a corporate merger, is virtually the

same now under the statute as it would have been under the common law. The District Court also concluded that the statute does not violate the due process clause of the Fourteenth Amendment. The Court found nothing arbitrary or irrational in the statute and stated that it is rationally related to a sound and legitimate State interest.

The Court of Appeals:

The Court of Appeals affirmed. It stated that Petitioners were fully aware of the statutory scheme and the potential deprivations it entails when they chose to dissent. The statutory provision was viewed by the Court of Appeals as "clearly designed to maximize the power of minority shareholders". It stated that a corporation would be induced to abandon a merger when it could not afford to pay the dissenters for their shares.

The Court of Appeals disregarded the statutory provision (BCL §623[a]) which had afforded Respondent corporation with knowledge of the number of non-assenting shareholders at least one day before the shareholders' meeting. The Court disregarded Respondent's knowledge of its lack of money to pay for such shares, and that Respondent's loan agreements prohibited the payment for such shares. The statute did not maximize the power of the minority shareholders. It deprived them of all power. It maximized the power of the Respondent corporation. Petitioners could not withdraw their dissent without the consent of the corporation. Had the shares risen in value and price in this eight-month period, Respondent would not have abandoned the merger. Even if Respondent had no money, it is reasonable to assume that its lenders would

have made available additional sums to buy shares at the low price of eight months earlier.

Petitioners' position was completely disregarded by the Court of Appeals. Their position is: The statute did accord Petitioners, as dissenting shareholders, the right to receive the value of their shares. They could have been divested of that right in a constitutionally correct manner upon abandonment of the merger and reinstatement to shareholder status; what need be done was to grant them a hearing and a forum in which to present their claim for their loss or damage resulting from such unilateral abandonment, and grant them an adjudication of their right to be compensated. The failure of the statute to make any such provision permitted the Respondent corporation to engage in an activity which is arbitrary and irrational.

Reasons for Granting the Writ

The questions are substantial. The abandonment provision which New York added to its corporation law in 1950 has been adopted in substance in 36 States, the District of Columbia, and in the Model Corporation Code of the American Bar Association. (See Appendix "D," pp. 34-35 for reference to the statute of each jurisdiction.) The construction of the provision by the Appellate Division of the New York Supreme Court, no doubt, will be followed by the courts in those jurisdictions.

I

The provision encourages a practice which is designed solely for the benefit of the corporation. It cannot result in any benefit to minority shareholders who dissent from

a proposed corporate action. When it is for the benefit of the corporation to proceed with the merger, e.g., when the market price for the dissenters' shares has risen, the corporation proceeds and has but to pay the lower price or value of the shares as of the statutory valuation date. When it is not for the benefit of the corporation to proceed, e.g., when the market price has declined, the corporation merely abandons the merger.

The statutory proceedings take from one to four years (see Appendix "E" at page 36). Since the corporation may abandon the merger at any time prior to final determination, the statutory provision does rise to "constitutional dimension". Upon abandonment, the dissenters are not restored to the financial position in which they were immediately before becoming monetary claimants. Their shares have declined in price and value. During this period they have no control over their investment. Their shares cannot be traded. They cannot withdraw their dissent, except with the consent of the corporation.

Upon objecting to the merger, pursuant to BCL §910 Petitioners acquired the right to receive the fair value of their shares, provided they complied with the procedural requirements of BCL §623. Petitioners did comply. They ceased having shareholder status. In lieu thereof they became monetary claimants. Their rights, as monetary claimants can be no less than the "expectations of interests" or "entitlements", of which they may not be deprived without observance of procedural due process. *Goldberg* v. *Kelly*, 397 U.S. 254, 261-262 (1970).

This procedural statute enables a corporation to deprive its minority shareholders, who do not assent to fundamen-

tal changes in the structure of their corporation, of substantive rights without due process. The statutory judicial proceeding, which they were compelled to commence, is automatically terminated upon the corporation's unilateral abandonment of the merger. They are denied the right to claim damages sustained as a result of the abandonment. Their damages are the difference in value and price of their shares as of the shareholders' authorization date and the value and price of their shares upon reinstatement to shareholder status when the corporation abandoned the merger. They are denied the right to claim damages for being deprived of their property during the period they were monetary claimants. They are denied the right to claim damages for being compelled to commence the statutory judicial proceeding. And they are deprived of a forum in which to be heard with respect to their claims.

This is the construction by the New York court of the statutory provision permitting a corporation unilaterally to abandon the merger which its shareholders had authorized.

The constitutionality of this statutory provision or any similar provision of any other State has not been passed on by this Court.

II

The District Court had granted Respondent corporation's motion to dismiss under Rule 12(b)(6). In dismissing the complaint, the District Court held that there was no "state action" within the meaning of the Fourteenth Amendment. The Court of Appeals did not review such ruling.

Respondent corporation abandoned the merger solely because it was permitted to do so by the provision in BCL

§623(e). The second question presented: Is the use by a corporation of this statutory provision "state action", or "private action" precluding maintenance of the action under 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343(3)?

The common law views the corporate charter as a contract between the corporation and its shareholders. The contract cannot be impaired without the consent of all parties. The State legislates. It permits impairment of the contract. It permits a corporate merger over the objections of non-assenting shareholders. It permits abandonment of the merger many months later, terminating the judicial proceeding which the statute had compelled the dissenters too commence. The statute, as enforced by the State court, forecloses the dissenters from claiming damages and losses sustained as a result of the action permitted and taken pursuant to the statute.

We submit that "state action" is present within the meaning of the Fourteenth Amendment and that the holding by the District Court is contrary to the principles enunciated by this Court in *Shelley* v. *Kraemer,* 334 U.S. 1 (1948) and *Reitman* v. *Mulkey,* 387 U.S. 369 (1967). This is all the more so because the New York courts have held that the sole and exclusive remedy available to a non-assenting shareholder is BCL §623 (*Blumenthal* v. *Roosevelt Hotel,* 202 Misc. 988, 115 N.Y.S.2d 52 (1952); *Beloff* v. *Consolidated Edison Co.,* 300 N.Y. 11 (1949); *Anderson* v. *International Mineral & Chem. Corp.,* 295 N.Y. 343 (1946)).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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